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TO: Board of Adjustment

CC: Commissioners, Planning Office

FROM: Alex Beal, Deputy *AB*

DATE: March 20, 2007

RE: Requests for Legal Opinion



Dear Board of Adjustment:

You made two formal requests for legal opinion at your meeting on March 5, 2007, relating to the implementation of Resolution 2038, which I have answered below.

What constitutes an "appeal," and what are appealable issues?

Generally, your job is to "in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the zoning resolution in harmony with its general purposes and intent." MCA § 76-2-221(1). This is the variance procedure. However, you are also tasked with the duty "to hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of" resolution 2038. MCA § 76-2-223(1)(a). In exercising those powers, you may "reverse or affirm, wholly or partly, or modify the...decision...appealed from and [you] may make such...decision...as ought to be made and...[you] shall have all the powers of the [planning office] from whom the appeal is taken." MCA § 76-2-223(2). Neither 2038 nor the Montana Code set out any alternative places to which an appeal can be taken. As such, all decisions of the planning department regarding application of zoning regulation may be appealed to the Board of Adjustment. Any and all decisions of the Board of Adjustment may in turn be appealed to the District Court. This is the statutory path that all appeals must take, and no step can be skipped. This process satisfies the due process rights of each applicant.

What is the effect of variance criteria 7, which states that “[t]he variance will not in any manner place the subdivision in nonconformance with any adopted zoning regulation or comprehensive plan?”

As you had noted at your last meeting, a very literal reading of variance criteria 7 might be applied to result in a lack of discretion on the part of the Board of Adjustment (BOA) to approve any variance. Resolution 2038 is an “adopted zoning regulation” and thus any applicant who required a variance from 2038’s strict impact would be in nonconformance. Such a reading would require that you deny each and every variance that came before you. Such a reading is not allowed by the statutes.

As discussed above, the BOA is required by statute (MCA § 76-2-221 et seq.) to satisfy the due process rights of individual applicants. The statute requiring the BOA states that the regulations adopting the board “shall provide that the board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the zoning resolution in harmony with its general purposes...” MCA § 76-2-221 (emphasis added). Because variances are designed to provide the opportunity for amelioration of unnecessary hardships resulting from the rigid enforcement of a broad zoning ordinance, criteria 7 may not be interpreted to prohibit all variances. To interpret criteria 7 to prohibit any variance at all would defeat the very purpose of having a variance procedure and would be contrary to state law.

Local regulations that conflict with statutes cannot be enforced. To bring the variance criteria into compliance with state law requiring a board of adjustment, criteria 7 should be interpreted to prohibit granting of variances that would place the subdivision in nonconformance with any **other** adopted zoning regulation or comprehensive plan. This interpretation is both legal and enforceable. If you imagine a county with multiple zoning regulations, this begins to make more sense. Individual variances would be needed from each zoning regulation that applied to the parcel. Any variance granted from one of them would need to keep it in compliance with the others, unless other variances were granted.

CONCLUSION

It is my opinion that the scope of your appellate review is that you may reverse or affirm any decision appealed from the Planning Office regarding application of the zoning regulation. Additionally, it is my opinion that variance criteria 7 must be interpreted to prohibit variances which conflict with other zoning regulations, not to 2038 itself.